U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 September 2006

BALCA Case No.: 2005-INA-00164
ETA Case No.: 2003-CA 09540512/JS

In the Matter of:

CLASSIC BURGER,
Employer,

on behalf of

ENRIQUE RAZO,
Alien.

Appearance: Edgardo A. Guerrero, Agent
Inglewood, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of alien labor certification for the position of Cook, Restaurant. The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.[1]

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file (AF) and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 13, 2001, Employer, Classic Burger, filed an application for labor certification to enable the Alien, Enrique Razo, to fill the position of Restaurant Cook. (AF 47). The position required two years of experience in the job offered and the ability to provide written and verifiable references.

On October 1, 2004, the CO issued a Notice of Findings (NOF) proposing to deny certification on the basis of the rejection of U.S. workers for other than lawful, job-related reasons. (AF 43). The CO observed that there was only one applicant. The CO considered this applicant qualified because his resume showed more than two years of experience as a cook. The CO observed that Employer had submitted two letters and one certified mail receipt as proof of contact. The first letter, dated November 2, 2002, referred to the advertised position and stated that an interview had been scheduled for December 9, 2002 at 8:00 a.m. to discuss the applicant's position, his experience, his skills and personal character. The second letter, dated December 11, 2002, referred to the earlier letter and stated that the applicant's next appointment was scheduled for December 19, 2002 at 8:00 a.m. A certified mail receipt dated December 13, 2002 accompanied the letter. The CO pointed out that there was no evidence when the first letter was sent or if or when the applicant received it. The CO also found that the letter might have been discouraging in nature, because of its reference to the applicant's personal character. The second letter was definitely discouraging, according to the CO, because it referred to an earlier interview that the applicant might not have known about. Employer was directed to document how the U.S. worker was recruited in good faith and rejected solely for lawful, job-related reasons.

Employer submitted rebuttal on October 25, 2004. (AF 34). Employer contended that it had sent the certified letter on December 11, 2002 after sending a letter by regular mail on November 30, 2002. According to Employer, the applicant had failed to show up for the first

interview, which was why the second letter was sent via certified mail. Employer indicated that it could not understand how a letter stating that an appointment for an interview had been scheduled to discuss skills, knowledge, experience and personal character would discourage anyone who was a law-abiding citizen and who "does not have to worry about anything but possessing the required experience." Employer expressed the same with regard to the second letter it sent. Employer asserted that the applicant did not have the courtesy to call to postpone, cancel, or attend the scheduled interview. According to Employer, the applicant was irresponsible and unreliable. Employer pointed to BALCA decisions wherein it was found to be permissible to reject a U.S. applicant who failed to attend a scheduled interview or who was unavailable or not interested.

A Final Determination was issued on December 20, 2004. (AF 29). The CO found that Employer failed to show how the applicant was rejected for job related reasons. The CO found that the initial letter may or may not have been received by the applicant, and if he did receive it, the language may have been discouraging. Employer's second letter referred to the previous letter and the applicant's failure to attend an interview, which also appeared discouraging. Employer's rebuttal presented disagreement with this finding; however, the CO found no basis to accept Employer's argument. As the CO could not find that the applicant was truly uninterested or unavailable, labor certification was denied.

Employer requested review of the denial by letter dated January 7, 2005. (AF 1). This matter was then forwarded to the Board of Alien Labor Certification Appeals (Board), and the Board docketed the case on June 14, 2005.

DISCUSSION

In its Request for Review, Employer reiterates the arguments made in rebuttal, also raising new facts not presented before the CO. Specifically, Employer claims for the first time on appeal that it attempted to contact the applicant by telephone. Employer's belated raising of this argument does not bolster its credibility on the issue of good faith recruitment. In any event, our review is to be based on the record upon which the denial of labor certification was made,

the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.,* 1988-INA-52 (Feb. 21, 1989) (*en banc*). Furthermore, where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989). Accordingly, Employer's supplemental evidence and newly raised arguments will not be considered herein.

Twenty C.F.R. § 656.21(b)(6) requires that if U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons. Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc*., 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988) (*en banc*). Actions which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursing their applications are a basis for denying certification.

There was only one applicant for the position at issue. The record before the CO provided no indication that Employer made any effort to contact this one applicant apart from the two letters sent, despite the fact that the applicant's resume also included a telephone number. There is no proof that the applicant ever received the first letter, nor is there any documentation of when that letter was sent. Instead of telephoning the applicant at that juncture to schedule an interview, Employer chose to write a second letter advising the applicant he had missed one appointment and further stating that it was "important that you come to this appointment, at the date and hour specified above." The correspondence was less than inviting. Given that there was only one applicant for the position, Employer's failure to attempt any other means of contact is indicative of a lack of good faith recruitment.

In *Bay Area Women's Resource* Center, 1988-INA-379 (May 26, 1989) (*en banc*), the Board held that where an employer only attempted to contact a U.S. applicant at one of three

possible telephone numbers and no attempt was made to contact her by mail, the employee's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. Similarly, in the instant case Employer's only efforts to contact the applicant were with letters that were less than inviting, claiming in one an intent to discuss an applicant's "personal character" while in a second alluding to the failure of the applicant to attend an interview and directing his appearance at a second appointment. Such efforts do not appear to have been made in good faith. Labor certification was properly denied and the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.